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No. 99-1257

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BROWNER, EPA ADMINISTRATOR,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC. *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICUS CURIAE* MERCATUS CENTER IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

The Mercatus Center at George Mason University is a non-profit research and educational institution, as defined by the Code of the Internal Revenue Service, 26 U.S.C. § 501(c)(3).[1] Its Regulatory Studies Program (RSP) is dedicated to advancing knowledge of administrative regulations and their effect on society. Through its Public Interest Comment Project, RSP submits independent analyses of proposed rules in agency rulemaking proceedings. It filed two such analyses with EPA on the proposed National Ambient Air Quality Standards for ozone and particulate matter during the comment period. Those comments identified the absence of any principled standards in EPA's selection of the levels of permissible ozone and particulate matter.

INTRODUCTION AND SUMMARY OF ARGUMENT

The principal issue in this case is whether the Environmental Protection Agency's (EPA) interpretation of Section 109 of the Clean Air Act (CAA), 42 U.S.C. § 7409, is consistent with the constitutional doctrine that congressional delegations of law-making power must state an "intelligible principle" confining agency discretion within cognizable grounds.[2] The CAA was interpreted by both EPA and the court below, pursuant to *Lead Industries Ass'n, Inc. v. EPA*, 647 F.2d 1130 (D.C. Cir.), cert.

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[1] The statements in this brief do not represent an official position of George Mason University. The parties' written consents to the filing of this brief have been filed with the Clerk of Court. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no persons other than the *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief. Counsel acknowledge the contributions of Wendy L. Gramm, Director, and Susan E. Dudley, Senior Research Fellow, at the Mercatus Center, to the writing of this brief.

[2] We do not address either the "ripeness" or the "subpart 2" issues raised by petitioner.

denied, 449 U.S. 1042 (1980)(*Lead Industries*), as prohibiting consideration of "any factor other than 'health effects relating to pollutants in the air'" in setting National Ambient Air Quality Standards (NAAQS) for ozone or particulate matter (PM). Pet. Cert. App. at 15a.

As a consequence, EPA's rules setting permissible ozone and particulate matter levels did not openly examine cost, risk or other adverse effects of the standards despite a clear correlation between such implementation "costs" and overall health effects on the public. See generally Mercatus Amicus Br. (99-1426) at 11-23; General Electric Company Amicus Br. (99-1426) at 4-18. Nor did the ozone and PM rules identify a specific standard or measurable factor under the CAA as the basis for the selected NAAQS levels. Instead, EPA asserted that Congress delegated to it unlimited "discretion to make the 'policy judgment'" of where the standard should be set. Pet. Cert. App. at 12a; see 62 Fed. Reg. 38,856, 38,869 (July 18, 1997); 62 Fed. Reg. 38,652, 38,691 (July 18, 1997). Under this framework, however, there is no principle or "determinate criterion" that EPA must satisfy in demonstrating that the levels it selected were authorized. Thus, the court of appeals found that EPA's interpretation of CAA §109, if not corrected, would raise serious questions under the nondelegation doctrine.

EPA argues that the decision of the court below, which states that EPA should interpret the CAA so as to avoid violation of the nondelegation doctrine, is "novel," "unprecedented," "contrary to the purpose of the delegation doctrine" and without any "basis in this Court's precedents." Pet. Br. at 18, 26 & 28; see also Pet. Cert. Br. at 9 (court of appeals' decision a "radical departure" from 65 years of consistent nonapplication of the nondelegation doctrine). In fact, however, it is EPA that has radically misread both this Court's application of the nondelegation principle and the lower court's adherence to clear precedent. All that the lower court held is that EPA's interpretations of the

CAA cannot disregard the nondelegation doctrine in reading § 109.

EPA acknowledges, as it must, that the nondelegation doctrine continues to be a viable principle underlying basic constitutional jurisprudence governing congressional grants of authority to administrative agencies. It cannot deny that both this Court and lower courts have adopted narrow readings of agency organic statutes where necessary to avoid constitutional invalidity under the nondelegation doctrine. Constitutional principles are frequently preserved by indirect means, see, e.g., *Kent v. Dulles*, 357 U.S. 116 (1958), but this less confrontational approach does not alter the importance or effect of the constitutional requirement.

The limited application of the nondelegation doctrine to read statutes narrowly is a reflection of the Court's prudent use of the rule.[3] However, this restrained use does not contradict the doctrine's importance as a foundational principle governing agency authority or its continuing validity.

Thus, despite EPA's hyperbole, the only distinctive aspect of the ruling below is not that the court of appeals construed the agency's reading of the CAA as raising "serious constitutional issues," but rather that the court did not interpret the CAA for itself. The lower court recognized that, as interpreted by EPA, the CAA did not spell out the requisite standards by which EPA was to set appropriate NAAQS levels. Thus, it remanded the matter to EPA for it to decide in the first instance whether another permissible interpretation was possible and reasonable. Pet. Cert. App. at 14a, 57a-58a. That deferential approach is

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[3] This Court has applied the "strong form" of the nondelegation doctrine to overturn legislation on only three occasions: *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (*Panama Refining*); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (*Schechter Poultry*); *Carter v. Carter Coal Co.*, 298 U.S. 238, 310-12 (1936).

commanded by *Chevron* where, as here, the statute is "silent or ambiguous" on the "precise question at issue," and it allows "the agency an opportunity to extract a determinate standard on its own." Pet. Cert. App. at 14a.

ARGUMENT

I. REQUIRING EPA TO IDENTIFY LIMITING CRITERIA IN ITS AUTHORITY UNDER THE CLEAN AIR ACT IS CONSISTENT WITH THE NONDELEGATION DOCTRINE AND ESTABLISHED PRECEDENTS

Contrary to EPA's overheated rhetoric, the court below did not invalidate the CAA or interfere with the agency's broad authority to regulate air quality. Nor did the court expand or alter the traditional use of the nondelegation doctrine when it rejected EPA's interpretation of the CAA as authorizing EPA to select any level based simply on its "policy judgment." 62 Fed. Reg. at 38,869 (ozone rule); *id.* at 38,691 (PM rule). Rather, the lower court held that EPA must first determine whether the statute can reasonably be read more narrowly before adopting such an extreme interpretation of § 109. The lower court thought such an interpretation was possible—e.g., by development, among other possibilities, of a "generic unit of harm." Pet. Cert. App. at 16a. As we and others have demonstrated, the statutory language does not prohibit EPA's reliance on sound decision making standards such as health-health, wealth-health and cost-benefit measures. See, e.g., Mercatus Amicus Br. (99-1426) at 12-22.

This ruling by the court of appeals is remarkable only for its ordinariness in applying the nondelegation doctrine in a limited sphere. It holds that it is the agency's responsibility to interpret the statute in a manner that is consistent with the principles of the nondelegation rule and to avoid unchanneled delegations of discretion to the agency. This ruling is buttressed by the undisputed principle of statutory construction that statutes should be

read so as to avoid constitutional confrontations. See, e.g., *Jones v. United States*, 120 S.Ct. 1904, 1911 (2000); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994).[4]

A. The Nondelegation Doctrine's Requirement That Agency Authority Be Confined By Some "Intelligible Principle" Is Applied Pragmatically

EPA does not dispute the core requirement of the nondelegation doctrine that legislative authority delegated by Congress to the executive must state "intelligible principles," *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928), by which the agency is given a "primary standard" to guide its action. *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904); see *Clinton v. City of New York*, 524 U.S. 417, 443-44 (1998). It is satisfied where "Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989) (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

Despite these strong statements, the nondelegation doctrine has not been applied *directly* to invalidate enabling legislation since 1936. See n. 3 *supra*. That does not mean that the doctrine has been abandoned. It is still a principled underpinning of basic separation of powers jurisprudence. In point of fact, its presence and *indirect* application have had an "important and continuing 'shadow' impact" on the reading and review of legislative delegations of authority to administrative agencies. Peter Strauss et al., *Cases and Comments on Administrative Law*

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[4] Such applications also are consistent with probable congressional intent because it is unlikely that the legislature intended to grant such unbridled power to a single administrator whose decisions are subject to deferential review. See *FDA v. Brown & Williamson Co.*, 120 S.Ct. 1291, 1314 (2000) (citing Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986)).

92 (9th ed. 1995). This indirect application usually results in a determination either that the agency discretion is narrower than claimed or that the claimed authority was not delegated because there was no clear statement of legislative intent to do so. Both approaches use the doctrine as an interpretive tool in order to avoid addressing constitutional objections. See *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); A. Vermeule, *Saving Constructions*, 85 Geo. L.J. 1945, 1948-49 (1997).[5]

1. The Nondelegation Doctrine Is Applied Indirectly To Narrow Interpretations Of Agency Authority

The seeds of this more limited, indirect application of the nondelegation doctrine are contained in its most celebrated case, *Schechter Poultry*. There, this Court contrasted the uncanalized (see 295 U.S. at 551, Cardozo, J., concurring) delegation of authority given the President to control wages and prices under the National Industrial Recovery Act with the broad authority given to the Interstate Commerce Commission and the Federal Radio Commission to regulate in the public interest, convenience or necessity and to the Federal Trade Commission to prohibit unfair or deceptive trade practices. *Id.* at 538-40, 552. In the case of the FRC and FTC, the delegations were upheld because the agencies' authority was restricted by specialized procedures, common law antecedents establishing basic substantive principles, and limited coverage to specific industries or business practices. *Id.* at 539-40.[6]

[5] EPA's argument that the lower court "incorrectly" applied the nondelegation doctrine to rule that the CAA § 109, as interpreted, was invalid, Pet. Br. at 18, misreads the court's holding. The court of appeals did not hold that the CAA was unconstitutional or that it should be so interpreted. Instead, what it said is that there appeared to be other interpretations of the CAA available which would incorporate the required "intelligible principle" and that the agency was to determine whether such a ruling was consistent with its view of the Act. Pet. Cert. App. at 14a, 16a-17a.

The primary applications of the nondelegation doctrine by this Court interpreting agency authority narrowly in order to avoid finding an unconstitutional delegation of power are:

- *Zemel v. Rusk*, 381 U.S. 1 (1965): upholding validity of area restrictions on passports after narrowing the Secretary of State's discretion by determining that the enabling act "authorizes only those passport refusals and restrictions 'which it could fairly be argued were adopted by Congress in light of prior administrative practice.' [quoting *Kent v. Dulles, supra*] So limited, the Act does not constitute an invalid delegation." *Id.* at 18.
- *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336 (1974): reviewing agency authority to assess operating cost fees against regulated parties at a level reflecting "direct and indirect cost[s] to the Government, value to the recipient, [and] public policy." *Id.* at 338. The Court acknowledged that "if [the public policy terms were] read literally" the statute would permit the FCC to act in the "manner of an Appropriations Committee of the House." *Id.* at 341. Thus, it upheld the delegation only after "read[ing] the Act narrowly to avoid [these] constitutional problems." *Id.* at 342; see *id.* (quoting from *Schechter Poultry* that "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested").

[6] Fulfilling the Court's expectations, over time, the meaning of this enabling authority has been narrowed further as the problems they address were more fully understood. See, e.g., FTC, *Policy Statement on Deception*, 4 Trade Reg. Rep. (CCH) ¶13,205 at 20,911-12 (Oct. 14, 1983) (stating elements applicable to deception cases); *Cliffdale Assocs.*, 103 F.T.C. 110 (1984) (same); FTC Act Amendments of 1994, 108 Stat. 1691, 95 (codified at 15 U.S.C. §§ 41-57c) (definition of "unfair acts and practices" borrowed from FTC, *Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction*, 4 Trade Reg. Rep. (CCH) ¶13,203 (Dec. 17, 1980)).

- *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980) (*Benzene*): overturning interpretation of the OSH Act and holding that regulation of airborne carcinogens at the lowest level feasible requires a showing of "significant risk." 415 U.S. at 614-15. The plurality justified this narrower interpretation as follows:

> [The Government's interpretation of] the statute would make such a "sweeping delegation of legislative power" that it might be unconstitutional under the Court's reasoning in [*Schechter Poultry* and *Panama Refining*]. A construction of the statute that avoids this kind of open-ended grant should certainly be favored. (*Id.* at 646)[7]

- *Touby v. United States*, 500 U.S. 160 (1991): upholding Attorney General's discretion to temporarily add or remove psychoactive drugs as prohibited or controlled substances only after the Government conceded limits on that discretion by requiring further testing before additions could be made to the most harmful category and by acknowledging that judicial review would be available as a defense to a criminal prosecution.

- *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 336 (1999) (*Iowa Utilities*): reversing FCC's reading of its statutory

[7] Then-Justice Rehnquist concurred expressly relying on a direct application of the nondelegation doctrine to invalidate the first sentence of § 6(b)(5) of the Act. *Id.* at 672. The plurality's narrower application of the doctrine is the ruling of the case. See *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds,'" quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). Thus, contrary to Judge Silberman's dissent from the denial of rehearing *en banc*, Pet. Cert. App. at 93a, the narrower holding of the *Benzene* plurality is a binding ruling and not a "makeweight[] tossed into the analysis, in light of Justice Rehnquist's concurrence, to help justify the result." *Id.*

authority under the Telecommunications Act of 1996, 110 Stat. 56, codified as amended 47 U.S.C. § 251, of the conditions on which local exchanges were to be open to competition. The agency's interpretation of the statutory terms ("necessary" and "impair") was unreasonable under *Chevron* step two because the FCC had failed to supply any "limiting standard, rationally related to the goals of the Act," 525 U.S. at 388, and because it permitted private parties rather than the FCC to set the content of the law. *Id.* at 389. Although the Court did not cite any nondelegation cases as support, these rationales are the twin touchstones of *Schechter Poultry* (see pp. 6-7, *supra*).[8]

One influential lower court case, *Amalgamated Meat Cutters & Butcher Workmen of N.A. v. Connally*, 337 F. Supp. 737 (D.D.C. 1971) (Leventhal, J., for 3-judge court) (*Amalgamated Meat Cutters*), also is noteworthy for identifying restrictions within a statute whose broad delegation of authority otherwise would have been invalid. There the court upheld non-wartime wage and price controls only after finding that the administrative authority was confined by substantive price control precedents and after incorporating other process restrictions. *Id.* at 758 (administrative "standards once developed limit the latitude of subsequent executive action"). The court further noted that "there is an on-going requirement of intelligible administrative policy that is corollary to and implementing of the legislature's ultimate standard and objective." *Id.* at 759. See aiso *American*

[8] Other decisions by this Court similarly have read statutes narrowly in order to avoid finding that an agency's authority includes the power to change its mandate—albeit without specifically relying upon the nondelegation doctrine. See *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 225 (1994) (reading word "modify" narrowly to reject FCC reading of tariff filing requirements as giving it sole discretion "to make even basic and fundamental changes in the scheme created" by Congress); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

Power & Light Co. v. SEC, 329 U.S. at 104 (upholding provision in the Public Utility Holding Company Act, 15 U.S.C. § 79k(b)(2), that prohibited "unduly complicated corporate structures and inequitable distributions of voting power" against a nondelegation doctrine attack because, looking at the "purpose of the Act, its factual background and the statutory context in which they appear," the Commission was given "a veritable code of rules . . . to follow").

2. The Nondelegation Doctrine Is Applied Indirectly Through The "Clear Statement" Requirement

Another, more nuanced application of the indirect nondelegation doctrine is the "clear statement" rule which provides that enabling acts should be construed narrowly so as to avoid substantial constitutional issues absent an express congressional mandate requiring the challenged rule or practice. The clear statement rule, like the nondelegation doctrine, is based on the principle that Congress, not just the agency, must expressly consider and speak clearly to the constitutional issue. The primary cases, in addition to the case under review herein, adopting this form of the indirect nondelegation rule, are:

- *Kent v. Dulles*, 357 U.S. 116 (1958): interpreting Secretary of State's passport authority narrowly to deny him the power to refuse a passport on grounds of political belief. The Court noted that it would "not readily infer that Congress gave the Secretary of State unbridled discretion . . . ." *Id.* at 129. Citing *Youngstown Sheet & Tube* and *Panama Refining*, the Court ruled that delegated powers trenching on liberty interests—here the "right of exit"—"must be pursuant to the lawmaking functions of the Congress" and "must be adequate to pass scrutiny by the accepted tests." *Id.* Thus, it "construe[d] narrowly all delegated powers that curtail or dilute them." *Id.* However, where the administrative policy was "'sufficiently substantial and consistent' to compel the conclusion that Congress has

[implicitly] approved it," *Haig v. Agee*, 453 U.S. 280, 306 (1981) (citing *Zemel v. Rusk, supra*), the delegation is reviewed in light of those restrictions.

- *Greene v. McElroy*, 360 U.S. 474 (1959): refusing to find an implicit congressional delegation of authority to the Department of Defense to administer a constitutionally questionable security clearance program. The Court reasoned that "[w]ithout explicit action by lawmakers, decisions of great constitutional import and effect" should not be "relegated . . . to administrators who, under our system of government, are not endowed with authority to decide" large constitutional questions. *Id.* at 507.
- *Rust v. Sullivan*, 500 U.S. 173, 191 (1991): holding that abortion counseling regulations did "not raise the sort of 'grave and doubtful constitutional questions' that would lead us to assume that Congress did not intend to authorize their issuance. Therefore, we need not invalidate the regulations in order to save the statute from unconstitutionality." (citations omitted)

This summary of decisions considering the indirect ("weak form") of the nondelegation doctrine shows that this Court has not hesitated to apply it to rein in administrative discretion where the agency has asserted that its authority gives it unbounded power to regulate. As shown further below, we believe that EPA's reading of § 109 of the CAA is just such an erroneous interpretation. It therefore should be curtailed as the court of appeals demonstrated.

B. As Interpreted By EPA, Section 109 Of The Clean Air Act Would Allow EPA To Set NAAQS Without Reference To Any "Determinate Criterion"

EPA advocates a simplistic view that the nondelegation doctrine is limited to the "strong form" cases which, they point out, have not been applied to invalidate any delegation since 1936. But its brief fails to consider, much less apply, those cases

which read enabling statutes narrowly or require a "clear statement" in order to avoid a direct confrontation with the nondelegation rule. Thus, EPA's argument fails to consider this Court's jurisprudence indirectly applying the nondelegation doctrine as set forth in *Zemel, National Cable, Benzene, Iowa Utilities, MCI, Amalgamated Meat Cutters,* and *Kent.*[9] Further, its *ipse dixit* that CAA § 109 "plainly satisfies the nondelegation doctrine," Pet. Br. at 26 n.20, is no substitute for analysis. Nor are other provisions of the CAA, Congress' frequent amendment of the Act, or the applicability of internal APA-type procedures and external judicial review, *id.* at 22-26, an adequate alternative. These provisions do not give EPA guidance on the applicable criteria for setting the appropriate NAAQS levels.

Nowhere in its 50-page "analysis" does EPA demonstrate how any of the "directives" in § 109 of the CAA constrict EPA's discretion in setting ozone or particulate matter levels—i.e., ozone at .08 ppm rather than .07 or .09. For example, EPA asserts that the "intelligible principle" standard is satisfied (in part) by the statutory requirement in § 109(b)(1)(A)-(B) that "a pollutant must 'reasonably be anticipated to endanger public health or welfare' and be emitted from 'numerous or diverse * * * sources'" in order to be regulated. Pet. Br. at 23. While EPA correctly quotes the statutory words, it does not show how that language confines EPA's discretion on setting the level for nonthreshold pollutants. Because both ozone and particulate matter can cause adverse health effects *at any level above zero*,

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[9] EPA attempts to rely on *Touby* (discussed p. 8 *supra*) as supporting its argument that the CAA puts "'multiple specific restrictions'" on EPA's discretion. Pet. Br. at 25 & n.19. But that argument was upheld in *Touby* only after the Government greatly narrowed its interpretation of the reach of the Controlled Substances Act and conceded that further testing was required before drugs could be added to the list of controlled substances by the Attorney General and that a defendant charged with a violation could always challenge the classification despite the Act's very restricted review provisions. See *Touby*, 500 U.S. at 169-70 (Marshall, J., concurring).

see Mercatus Center Amicus Br. (99-1426) at 6, § 109 identifies only categories of pollutants that can be regulated, not the range or basis for selecting any specific NAAQS level.

In addition, the procedural and judicial review devices set forth in the CAA do not provide further guidance. If such "procedural and review restrictions" were sufficient, a statute that authorizes EPA to "go forth and do good" without regard to implementation costs would be sufficient to satisfy the nondelegation doctrine. See *Central Forwarding, Inc. v. ICC*, 698 F.2d 1266, 1284 (5th Cir. 1983) (rejecting expansive interpretation of the National Transportation Policy, "which paraphrased says little more than 'go forth and do good,' as a congressional grant of rulemaking authority might well amount to an unconstitutional delegation of legislative authority").

EPA's argument fails to identify any "determinate criterion" elsewhere in the statute, legislative history or other rules which EPA must weigh in setting NAAQS levels. Costs are ruled out because of *Lead Industries*. EPA has not identified health-health, wealth-health or any other decision framework from which such guidance could be obtained. See Mercatus Center Amicus Br. (99-1426). Therefore, the CAA must be reinterpreted consistent with the nondelegation doctrine if the ambient air program is to be extended to new ozone levels or particulate matter.

C. Remanding The Matter To EPA To Identify The Criteria For Determining The Level Of Nonthreshold Pollutants Is Required By *Chevron*

There is one element in the lower court's application of the nondelegation doctrine that could be said to be "novel" or "unprecedented." Its ruling that EPA rather than the reviewing court should, in the first instance, determine the meaning embedded in § 109 regarding the criterion(ia) that governs the establishment of NAAQS levels is distinctive. Pet. Cert. App. at 4a (court ordered "remand [of] the cases for EPA to develop a

construction of the act that satisfies this constitutional [i.e., nondelegation] requirement"). In all prior cases applying the indirect nondelegation doctrine, see pp. 7-11 *supra*, the court rather than the agency determined the meaning of the statute.[10] On the other hand, the new direction provided by the lower court here, of remanding the issue to the agency, is simply an adaptation of the indirect nondelegation doctrine to current standards of judicial review.

Under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-44 (1984), reviewing courts are to defer to reasonable agency interpretations of statutes that do not clearly reveal Congress' intent on the precise issue in question. Just as EPA was allowed in *Chevron* to determine whether Congress meant that EPA's regulation of "stationary sources" of pollution allowed it the choice between measuring emissions solely by each individual source or on a plant-wide basis, here it is for EPA to interpret the meaning of § 109 and to identify the determinate criteria consistent with Congress' intent.

The identification of the numerical equivalent or level necessary to "protect public health" with an "adequate margin of safety" (per CAA § 109) for nonthreshold pollutants is essentially a legislative task consistent with EPA's authority to issue NAAQS as legislative rules. Thus, it is particularly appropriate that the agency be directed to fill in the meaning of this statutory standard through legislative rulemaking. See also *Hoctor v.*

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[10] *Iowa Utilities* might be said to be an exception because there the Court found that the 1996 Telecommunications Act was ambiguous and thus under *Chevron* step two was to be interpreted by the FCC. Even then, however, the Court substituted its reading for the agency's because the agency's reading was not "reasonable." 525 U.S. at 392. Further, the Court not only held that the FCC had failed to identify any restrictive standard, but also that private parties, rather than the FCC, were to decide the critical policy issues. On the other hand, the Court vacated the FCC rule because it was based on an erroneous interpretation, *id.* at 391-92, and to allow it to identify the limiting standard in a manner consistent with the Court's reading of the Act.

USDA, 82 F.2d 165 (7th Cir. 1996) (Posner, C.J.) (numerical requirements involve legislative judgments which agencies are better positioned to make). Under the lower court's ruling, EPA's interpretation will be upheld (if reasonable) if it provides a standard which it applied when determining the particular NAAQS levels.

Enforcement of the nondelegation doctrine, to require that NAAQS levels be consistent with Congress' stated purpose of protecting the public health with an adequate margin of safety, is consistent with the policy bases of *Chevron*. Not only is EPA a quasi-legislative body held accountable by the President's authority over it, but also EPA is the body best positioned to determine the range of policy choices Congress intended when it drafted § 109. 467 U.S. at 865-66. Nor should there be any concern that under these circumstances the agency's interpretation is "carved in stone." To the contrary, it can be modified as necessary to meet changing circumstances. All that the court of appeals did was eliminate one of those choices, namely, EPA's interpretation that it could select particular NAAQS levels simply based on its "policy judgment" without regard to any determinate criterion. But once it identifies the criteria it will apply in selecting the NAAQS levels, those criteria can still be modified as long as the changed interpretation is plausible and is justified by cogent reasons. See *Rust v. Sullivan*, 500 U.S. at 186-87.

II. REVIEW OF LEGISLATIVE RULES UNDER THE ADMINISTRATIVE PROCEDURE ACT IS NO SUBSTITUTE FOR THE NONDELEGATION DOCTRINE

Review under the Administrative Procedure Act's "arbitrary and capricious" test, 5 U.S.C. § 706(2)(A), is not a substitute, as Judge Silberman contends, for application of the nondelegation doctrine to control standardless discretion. Pet. Cert. App. at 95a-96a. The nondelegation doctrine, as applied by the court

of appeals, requires that EPA determine Congress' intent when it prescribes NAAQS to protect public health with an adequate margin of safety. As long as EPA's interpretation of the Congressional intent restricts administrative discretion to understandable bounds, it will not be disturbed by the nondelegation doctrine. And as long as that interpretation by EPA is reasonable—i.e., a permissible and reasonable interpretation of § 109— it will be upheld under *Chevron*.

On the other hand, application of the arbitrary and capricious test under § 706(2)(A) of the APA requires that the particular NAAQS levels selected by EPA must reflect a reasoned decision. That is, the facts must be supported by sufficient evidence, and the inferences drawn from them, as well as the policy rationale and ultimate conclusions, must be adequately connected, explained and justified. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

The nondelegation doctrine looks to the interpretation given the Congressional statute and asks whether the authorized administrative action is confined by intelligible standards. By contrast, arbitrary and capricious review does not look at the statutory authority and its definiteness. Rather, it examines the administrative action itself and asks whether the rule is the product of reasoned decisionmaking. Defining the authority and discretion granted by Congress is not the same thing as deciding whether agency policy choices are adequately supported by the record and reasons. The two requirements complement each other; one is not a substitute for the other.

III. EPA DID NOT RECOGNIZE ANY LIMITATIONS ON ITS DISCRETION TO SET NAAQS FOR OZONE AND PARTICULATE MATTER

EPA argues, in the alternative, that its choices were "channel[ed]" and "narrow[er] than the [lower] court acknowledged." Pet. Br. at 31-34. It contends that its discretion was limited both by "upper" and "lower" bounds, *id.* at 31, by "the latest

scientific knowledge on the health effects" of PM and ozone, and by the requirements of reasoned decision making (i.e., "that the agency consider relevant factors, apply them to relevant facts, respond to criticisms and adequately explain its rationale"). *Id.* at 32.

But process, while important, is no substitute for substantive standards. Indeed, without some standard, judicial review is unlikely to be effective in controlling arbitrary action. *Amalgamated Meat Cutters*, 337 F. Supp. at 759. Thus, EPA's process-based argument is meaningless. It would uphold virtually any regulatory scheme subject to the procedural requirements and traditional "arbitrary and capricious" test under the Administrative Procedure Act, regardless of the absence of any limits on the agency's substantive authority. Because virtually all agencies are now governed by similar APA requirements, see *Dickinson v. Zurko*, 527 U.S. 150 (1999), this assertion, if accepted, would nullify the nondelegation doctrine. To be sure, procedural and judicial requirements are important constraints on agency discretion if the substantive provisions, express or otherwise, include intelligible principles or standards by which the agency action is measured. See *Yakus v. United States*, 321 U.S. 414, 437 (1944). However, neither procedural nor judicial review requirements limit policy choices where no substantive criteria are identified. EPA's rulemaking record included mountains of "scientific evidence," but EPA cannot identify anything in the record that supports one NAAQS level over another.[11] We thus turn to the first two contentions.

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[11] In addition, EPA's brief often claims evidentiary support where none is there. For example, its reference to a CASAC review as supporting an upper bound of .08 ppm on ozone (Pet. Br. 33, cross referencing *id.* at 13-14) is in error. That review occurred in 1993 unrelated to the rulemaking at issue here; it does not refer to the CASAC review relied upon as support for the challenged rule; and it concluded that the ozone standard should not be tightened. Thus, it is disingenuous at best for EPA to rely upon this study as a basis for a tighter standard.

Contrary to EPA's contentions, its rulemaking statement never identified either an upper or lower bound for the standards. (Indeed, the preambles to the final ozone and PM rules never use such terms.) For example, the citation to PM App. 2145 & 2147 (Pet. Br. at 31) refers only to the "staff's judgment" on consideration of "an annual $PM_{2.5}$ standard set below a level reflecting approximate equivalence with the current annual NAAQS," and to their "belie[f]" that a level of 12.5 μpgm^3 is appropriate because it is "the lowest cutpoint for a possible threshold." Neither staff opinion was adopted by the Administrator and neither was said to be a limitation on her discretion.

Nor is there any support in the rulemaking record that EPA was confined by the "latest scientific knowledge" on its selection of the PM and ozone levels. EPA's statement in the final PM rule nowhere defines a range for the standard. The cited pages (Pet. Br. at 32 referencing 62 Fed. Reg. at 38,675-77) mention only the ranges observed in different studies and concludes without explanation that the level selected (of 15 μpgm^3) is appropriate. EPA's referenced scientific support for the ozone rule (Pet. Br. at 32 cross referencing p. 13 citing 62 Fed. Reg. at 38,863-64) is similarly untrustworthy. EPA cites a 1993 CASAC review of the prior standard to suggest that the existing .12 ppm one-hour standard is an upper bound. However, even this limitation provides no guidance as to the level at which the NAAQS should be set. In any event, this conclusion was not endorsed by CASAC in its review of the current standard. There it said only that "there is no 'bright line' which distinguishes any of the proposed standards . . . as being significantly more protective of public health." CASAC Letter to Carol Browner re: Ozone (November 1995) in Ozone JA 238.

No matter how EPA now seeks to dress-up its rulemaking analysis and assert that its discretion is "narrowly" confined, Pet. Br. at 31; see *id.* at 25, in fact it relied solely on the bald claim that determining the "adequate margin of safety" was a

"policy judgment left specifically [by CAA § 109] to the Administrator's judgment." 62 Fed. Reg. at 38,857; 62 Fed. Reg. at 38,653.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the court of appeals and remand the matter to EPA for it to interpret § 109 of the CAA in light of the requirements of the nondelegation doctrine.

Respectfully submitted,

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